STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 24, 2011
v	No. 296111 Delta Circuit Court
ARNOLD BERTHOLD PROEHL, Defendant-Appellant,	LC No. 09-008108-FH

Before: RONAYNE KRAUSE, P.J., and SERVITTO and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction, following a jury trial, of failing to provide adequate care for a number of horses he owned, MCL 750.50(4)(c). Defendant was sentenced to serve 45 days in jail and 5 years probation, during which time defendant was ordered not to own or possess horses, or to live in a residence where horses were present. Defendant was also ordered to pay $13,632.59 for the cost of the care, housing and veterinary care of the horses involved in the case. Because there was sufficient evidence to convict defendant pursuant to the applicable statute, the prosecutor did not engage in misconduct, and defendant was not denied the effective assistance of counsel, we affirm.

Before the charges in the instant case were filed, as a condition of probation for a previous offense of allowing horses to run at large, defendant was ordered by the district court to disperse his herd of horses. Rather than abide by the terms of the district court's order, defendant conspired with his co-defendant and cousin, Marvin Harris, to evade the court's order by moving some of the horses to Harris's property, and for both parties to act as though Harris was the owner of the horses. Defendant and Harris produced forged receipts which they submitted to the district court purporting to show the sale of the horses. However, the Delta County prosecutor's office apparently continued to monitor the wellbeing of the animals, and sixteen horses were seized from Harris's property on January 10, 2009, after a state trooper observed a dead horse on the property as well as inadequate food, water, and shelter. At least two veterinarians found that several of the horses were malnourished using a physical evaluation tool known as body condition scoring, or the Henneke Body Condition Score System.

Defendant first argues on appeal that the prosecutor failed to prove that he was guilty beyond a reasonable doubt of neglecting his horses under MCL 750.50. We disagree.

This Court reviews challenges to the sufficiency of evidence in criminal trials de novo. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). This Court must determine whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Id.*

MCL 750.50 states, in pertinent part, as follows:

> (2) An owner, possessor, or person having the charge or custody of an animal shall not do any of the following:
>
> (a) Fail to provide an animal with adequate care.
>
> * * *
>
> (e) Abandon an animal or cause an animal to be abandoned, in any place, without making provisions for the animal's adequate care, unless premises are vacated for the protection of human life or the prevention of injury to a human. . . .
>
> (f) Negligently allow any animal, including one who is aged, diseased, maimed, hopelessly sick, disabled, or nonambulatory to suffer unnecessary neglect, torture, or pain.

Defendant first argues that, to him, nothing appeared to be wrong with his horses, so under the statute he is not liable. This argument misinterprets the standard set forth in the statute. MCL 750.50(1)(a) defines "adequate care" as the provision of sufficient food, water, shelter, sanitary conditions, exercise, and veterinary medical attention in order to maintain an animal in a state of good health." Several veterinarians who testified agreed that several of defendant's horses were in danger of malnourishment or starving, and the veterinarian who performed the necropsy on the deceased horse testified that it died of malnutrition and neglect. According to her testimony and necropsy report, the deceased horse was emaciated, and too thin to withstand the cold winter weather. The veterinarian testified further that she believed that the horse became weak and hypothermic and died of exposure. Defendant's personal belief that his horses were in good health and had adequate care, including access to food and shelter, was therefore based on fallacy, and has no effect on his liability under the statute.

Next, defendant argues that in order to be convicted under the statute, the prosecution was required to prove that defendant was guilty of criminal negligence, rather than ordinary negligence.

MCL 750.50 does not define "negligently." However, prior to 2008, MCL 750.50(2)(f) provided that an owner or possessor of an animal shall not "willfully or negligently allow any animal . . . to suffer unnecessary neglect, torture, or pain." In 2007, the Legislature amended MCL 750.50 (effective April 1, 2008), deleting the term "willfully" from the above. See PA 151, 2007. According to the Legislative analysis of House Bill 4551, the amendment of the statute would "remove the element of intent from the prohibition on willfully or negligently allowing an animal to suffer unnecessary neglect . . ." Thus, it could be reasonably argued that

the Legislature intended that ordinary negligence support a charge and conviction under MCL 750.50(2). Moreover, in the instant case, the prosecution presented sufficient evidence in the instant case to support defendant's conviction under any mens rea standard.[1]

This Court has held that the following elements must be established to show that the defendant acted with gross negligence:

> (1) Knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another.
>
> (2) Ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand.
>
> (3) The omission to use such care and diligence to avert the threatened danger when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another.[*McCoy*, 223 Mich App at 503 (quotations omitted)].

At trial, ample evidence was presented concerning the horses' malnourishment, their lack of an adequate water supply, that they were subjected to unsafe conditions, and that they were given inadequate shelter for animals in the condition in which they were found. Defendant does not argue that he was not the cause of the animal's poor health, or that the actual cause of their poor health is too remote to be legally attributable to him. Defendant instead asserts that "he had never been told that there was a body score problem with his horses," nor had his veterinarian told him that his horses were not receiving adequate care. However, this statement was directly contradicted by his veterinarian's testimony that she "repeatedly" asked defendant to reduce the size of his herd in order to better care for them because "he can't handle 40 horses on that property." She also testified that defendant had seen letters she had written on his behalf in which she suggested that "ten horses would be plenty" for him. Thus, compelling evidence was offered at trial that defendant was not simply ignorant to the conditions of his horses, but was instead unwilling to heed the advice of trained equine professionals. Thus, even under a "gross" or "criminal" negligence standard, the prosecutor presented sufficient evidence to support defendant's conviction.

Defendant also claims that he is an animal hoarder, which is a "psychological condition" that mitigates his intent. Defendant cites House Bill No. 5946, 94th Legislature (Mich 2008), which has not been adopted, claiming that the same would amend MCL 750.50 to include provisions specific to persons such as him. The bill defines animal hoarding as follows:

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[1] This is assuming, of course, that a negligence standard is even appropriate for determining liability under MCL 750.50(2)(a). Here, the jury instructions contained only a recitation of acts under MCL 750.50(2)(a) and (f), using the language of the statute, that would render defendant culpable under the act; along with statutory definitions for "neglect", "adequate care", "shelter", "sanitary conditions", "treatment" and "state of good health." Defense counsel did not object to these instructions, and does not do so now on appeal.

> "Hoard Animals" means to possess a large number of 10 or more animals if both of the following conditions are met:
>
> (*i*) The animals' living conditions negatively impact their health and well-being.
>
> (*ii*) The possessor of the animals displays an inability to recognize or understand the nature of, or has a reckless disregard for, the harmful nature of the animals' living conditions and the deleterious impact of those living conditions on the health and well-being of the animals or human beings.

Defendant acknowledges that this bill has not become law, but states that "the very nature and existence of the bill should serve as notice to this court of the impropriety" of his conviction. Apparently, it is defendant's contention that this Court should overturn his conviction because he lacked the capacity to appreciate the fact that his horses were not receiving adequate care due to the psychological condition of hoarding. This argument lacks merit, for several reasons. First, the language of the bill has not been incorporated into the statute. Secondly, even if the statute had been amended to include this language, the bill does not indicate that the condition of animal hoarding would be a defense to a violation of the statute. Rather, the bill included language expressly stating that a person shall not hoard and that one's reasons for hoarding are not a defense to violating the statute: "A person's affection for or humanitarian purpose in acquiring the animals is not a defense to a violation of this subdivision." *Id*. Additionally, defendant produced no evidence at trial to support his allegation that he suffers from the condition of animal hoarding.

Defendant also argues that the prosecutor committed misconduct and thereby denied him a fair trial by eliciting testimony relating to defendant's fraud on the district court in a separate matter, in violation of MRE 403 and 404(b). We disagree.

On cross-examination, defendant admitted that he had forged receipts along with his co-defendant in an effort to make it appear that he had sold his horses to co-defendant. One of defendant's horses died on co-defendant Harris's property, while other horses seized from Harris's property were malnourished and had been otherwise neglected. The only reason the horses were at Harris's property was because of the fraud that defendant and Harris had committed on the district court in conspiring to evade the court's order requiring defendant to sell some of his horses. It would have been very difficult, if not virtually impossible, to explain the circumstances of the crime, i.e., why defendant's horses were living at Harris's property, without introducing evidence of the earlier fraud.

Evidence that "is so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime" is not subject to exclusion under MRE 404(b). *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996). It was an element of the offense for which defendant was on trial that the prosecution prove that he was the owner or possessor of the horses. See MCL 750.50(2). Therefore, the circumstances surrounding the horses' presence at Harris's property were intrinsically related to the case. This evidence also disproved defendant's testimony that no one had ever told him to reduce the size of his herd. Thus, we find defendant's claim of error to be without merit.

Defendant argues in the alternative that his trial counsel was ineffective for failing to object to the evidence of his fraud and that the trial court did not control the proceedings. Because there was no error in the admission of this evidence, defendant cannot claim that defense counsel was ineffective for failing to present a meritless objection, or that the trial court somehow failed to properly control the proceedings. See *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Affirmed.

/s/ Amy Ronayne Krause
/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher